In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 832

WORLD AIRWAYS, INC., ET AL., PETITIONERS

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

On November 7, 1963, the Airline Division of the International Brotherhood of Teamsters filed an application with the National Mediation Board pursuant to § 2, Ninth of the Railway Labor Act, 45 U.S.C. 152, Ninth, for an investigation of an alleged representation dispute among those employees of the petitioner World Airways, Inc. who were members of the three crafts of Airline Pilots, Flight Engineers and Flight Navigators, all of whom had previously been unrepresented for collective bargaining purposes (R. 15, 29).[1]

Shortly after the application was filed, the carrier

[1] "R." refers to the record below in *World Airways, Inc.* v. *National Mediation Board, et al.*

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informed the Board that it believed that such employees constituted one craft instead of three; "demand[ed] the right under the Railway Labor Act to participation in a hearing on the class or craft issue"; and sought the Board's assurance that, in any representation election which might be held, the Board would not use its traditional form of ballot but would use one containing spaces for employees to mark votes against any representation (R. 32–33).[2] The Board rejected the carrier's demands (R. 40), and requested the carrier to supply the Board's mediator with the names and addresses of the employees involved (R. 36). World Airways refused to give the mediator access to its payroll books and records, from which he could obtain the information (R. 41).

Instead, the carrier brought suit against the Board and its members for an injunction restraining the Board (1) from conducting any election or certifying any representative without first affording the carrier a hearing on the craft issue, and (2) from conducting an election with the Board's traditional form of ballot (R. 8). The United States then filed an action against the carrier and two of its officers to restrain them from refusing the Board access to the payroll books and records (Pet. App. 1–2). The two actions were consolidated for trial, and the district court denied both injunctions (Pet. App. 2).

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[2] The form of ballot which the National Mediation Board has employed since 1934, does not contain spaces for employees to mark votes against any collective bargaining representative. Employees who wish so to vote do so by not casting ballots. See, *Railway Clerks* v. *Employees Assn.*, 380 U.S. 650, 656–657, 668–671.

On cross appeals, the Court of Appeals for the Ninth Circuit affirmed the denial of the injunction that petitioners had sought, and directed that their complaint be dismissed (Pet. App. 3). The court, pointing out that petitioners' only two contentions were (1) that the carrier was entitled to demand and participate in a hearing on the appropriate craft and (2) that the Mediation Board's form of ballot was unlawful, held that the case was controlled by *Railway Clerks* v. *Employees Assn.*, 380 U.S. 650, where this Court last Term rejected the identical arguments. The court of appeals further held that since these contentions also constituted petitioners' sole defense in the suit by the United States, the latter was entitled to relief and directed the district court to issue the injunction which the government sought (Pet. App. 3).

Relying upon the statement in *Railway Clerks* v. *Employees Assn., supra,* 380 U.S. at 661, that the Mediation Board's action "is reviewable only to the extent that it bears on the question of whether it performed its duty to 'investigate' the dispute," petitioners argue (Pet. 12–15, 20–23) that the Board did not properly perform its investigatory duty and that the court of appeals erred in failing to consider this matter. Since petitioners did not make this contention at all in the district court and made it in the court of appeals only in oral argument (R. 3–9, 32–33, 53–54, 79–80, 103–106, 108–109), the court of appeals was fully justified in treating the cases as involving

only the two issues which this Court resolved against petitioners in *Railway Clerks, supra.* In any event, the contention is premature at the present time.

The Board has not completed the performance of its statutory duty to investigate the representation dispute. For petitioners, by refusing the Board access to their books and records which contain the names and addresses of their employees,* have prevented the Board from performing that function. Indeed, petitioners' refusal has prevented the Board even from determining finally whether there is a genuine representation dispute which it should investigate.

The Board's regulations provide that it will not investigate a representation dispute unless the application is accompanied by employee authorization cards covering a designated percentage of employees, 29 C.F.R. 1206.2(b). After an application is received, the Board requests the carrier to furnish the number of employees in the craft or crafts involved but not their names and addresses (R. 15–16). The Board requires this information to make a *preliminary* determination whether the applicant submitted a sufficient number of authorization cards. The carrier

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* Section 2, Ninth of the Railway Labor Act, 45 U.S.C. 152, Ninth, provides: "The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

provided such information here (R. 16, 29). On the basis of this preliminary determination, the Board either dismisses the application or dockets it as a representation dispute and assigns a mediator to investigate it. After the case has been docketed, the mediator examines the carrier's records so that a *final* determination can be made whether a sufficient number of authorization cards were submitted. In order to make this determination, the Board needs the names of the employees to check them against the signatures on the authorization cards (R. 17–18).

The Board investigates and attempts to resolve a representation dispute only after it has finally determined that such a dispute exists; and it is only as part of that investigation that the Board decides whether to hold an election and what employees should participate therein (*i.e.*, what is the appropriate craft). Since in the present case the carrier refused to permit the Board to examine its books and records to ascertain finally whether a sufficient number of authorization cards were submitted, there is no valid issue in this case at this time whether the Board properly performed its statutory duty of investigation. For upon examination of the carrier's records the Board might discover that an insufficient number of valid authorization cards were submitted with respect to each of the job classifications involved. In that event the Board would dismiss the application regardless of whether these job classifications constitute one

or three crafts.[4] The issues which petitioners raise, therefore, cannot arise unless and until the Board, on the basis of a final determination that a sufficient number of authorization cards have been submitted, decides to investigate and to attempt to resolve the dispute;[5] and it cannot make that determination unless and until it examines the carrier's records.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

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[4] It is of course true that in determining whether a sufficient percentage of authorization cards have been submitted so as to give rise to a representation dispute as defined by the Board's rules, the Board may in some cases have to make a preliminary determination as to the appropriate craft lines. We have been advised by the Board that such preliminary determinations, where necessary, are made on the basis of previously established craft lines. However, even where the Board must make a preliminary craft determination in order to decide whether the requisite number of authorization cards have been submitted, such determination does not necessarily control the resolution of the representation dispute, and the Board will investigate the question of the appropriate craft in connection with the holding of a representation election.

[5] In *Railway Clerks* v. *Employees Assn.*, *supra*, upon which petitioners rely, the carrier did not institute judicial proceedings until after the National Mediation Board had "concluded that a dispute existed requiring an election and scheduled one for January 1963." 380 U.S. at 655.

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